PETITION NOT PRINTED

No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL AND DONALD LESTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (R. 215–222) is reported at 269 F. 2d 688.

JURISDICTION

The judgments of the court of appeals were entered on August 27, 1949 (R. 223). Petitioners' motion for a rehearing was denied on September 15, 1959 (R. 223). On October 12, 1959, Mr. Justice Frankfurter extended the time for filing a petition for writ of certiorari to and including October 24, 1959 (R. 224). The petition for a writ of certiorari was filed on October 22, 1959, and granted on March 7, 1960, 362

U.S. 909 (R. 225). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Court limited the grant of certiorari to Question No. 5 presented by the petition, which reads as follows:

> Whether production of a statement which was read and signed by a government witness is excused after a complete foundation for it is made under 18 U.S.C. 3500 on the ground that the only document in the possession of the prosecutor is a summary by an F.B.I. Agent and not the statement signed by the witness without any showing as to what became of the original statement.

In our view, this formulation of the question does not accurately reflect the record. The questions actually presented on this record are:

1. Whether, when notes of an interview (which the witness testified had been read back to him and might have been signed by him) were not in existence at the time of trial, the court should have directed that there be turned over to the defense a later report by the government agent which the witness testified was not a substantially verbatim account of what he had told the agent.

2. Whether the non-existence of the notes required that the testimony of the witness be stricken.

STATUTE INVOLVED

18 U.S.C. 3500 provides in pertinent part:

* * * * *

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order

the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

* * * * * *

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

Petitioners were convicted after a jury trial in the United States District Court for the District of Massachusetts on a seven-count indictment which charged them with bank robbery and jeopardizing the lives of several persons in violation of 18 U.S.C. 2113. Each was sentenced to imprisonment for twenty years on count 1, ten years on count 2, and twenty-five years on

each of the remaining counts, the sentences to be concurrent. The court of appeals affirmed (R. 215–222). The evidence pertaining to the question upon which certiorari was granted may be summarized as follows:

1. *The testimony of the witness Staula.*

The government witness referred to in the question as to which certiorari was granted was one Dominic Staula, owner and operator of a plumbing and heating business, and a depositor in the bank in question. His testimony was significant for his identification of petitioner Lester as one of three men who on the morning of July 18, 1957, entered and robbed the Canton, Massachusetts, branch of the Norfolk County Trust Company, a member of the Federal Reserve System, and the deposits of which were insured by the Federal Deposit Insurance Corporation. The robbers were armed with revolvers and jeopardized the lives of several employees and customers of the bank. After taking possession of bank funds estimated to be $31,618, they locked all persons present in the bank vault and made their escape.

Witness Staula had arrived at the bank that morning in order to make a deposit. He went to a desk, where he prepared a deposit slip, and then walked over to one of the cages, which at the moment was empty. While he was waiting for the teller to return, he heard a voice beside him telling him to get over against the wall. Staula turned and looked into the muzzle of a gun. The man said, "Get over against the wall, or we might have to kill somebody." Staula testified the man was about six feet tall and that all he noticed was his shirt—a white one with

short sleeves. Staula raised his hands and complied (R. 138–139, 141).

While Staula was standing over against the wall with his hands raised, another man standing behind him would direct anybody coming in the door to line up with the others against the wall. Once or twice Staula got a glimpse of this second man from the corner of his eye. He had on a blue suit and a soft hat and was wearing dark glasses. He seemed to be taller than Staula (R. 140, 142–143). He knew there was a third man because he "could see one from the side view and he was talking to another fellow behind the cages which was not the one standing behind me." (R. 140). He got a glimpse of the third man when they were emptying money in a paper bag (R. 143).

Staula was asked to step down from the witness stand and to point out any person in the court room (other than an employee or customer of the bank) whom he saw on that occasion. Staula stated that petitioner Lester looked like the man who had the gun and told him to go over against the wall (R. 143–146). He was asked (R. 145):

> The Court: Well, the question is whether or not he is the man. Is he the man?
>
> The Witness: Do I have to answer that?
>
> Q. The Court has asked the question, sir.
>
> The Court: Does anyone object to that question?
>
> Mr. Koen [Assistant United States Attorney]: I don't object to the question.
>
> Mr. O'Donnell [defense counsel]: I object to it.

Mr. Koen: Then I will ask the question, sir.
Q. Is that the man, sir?
The Court: Giving your best memory.
The Witness: He looks like the man.

Staula was then asked if there was anyone else in the court room who was present in the bank, and who was not an employee or customer of the bank. Staula responded that he could not be sure, but that Arnold Campbell resembled the man in the blue suit (R. 145). When the witness' attention was again directed to Lester, the latter protested. Staula stated that this was the man he had referred to as ordering him over against the wall (R. 146–147).

On cross examination, Staula testified that he had looked at the man who gave the order (whom he had identified as Lester) for a matter of seconds (R. 157–158). His glance at the second man in the blue suit was only a side glance which was very short (R. 158–159). He testified on cross-examination that, the day after the robbery, he went with Boston police to the vicinity of a gas station where he was asked to observe a helper. He told the police that the man had a slight resemblance to one of the robbers. This man at the gas station was not the man who had the gun (R. 168–190). At the gas station, Staula was shown a number of pictures and he picked out the picture of Lester (R. 181, 189). No F.B.I. agent was present at this time (R. 168, 193). When asked whether, before coming to court, he had ever told anyone he could make a positive identification, Staula said he had done so, to the grand jury (R. 178).

2. *Petitioners' request for statements.*

On cross examination, Staula was asked about an interview with F.B.I. agents after the robbery took place. He remembered that there were at least two agents, but did not remember their names; the interview took place at the Canton police headquarters about noontime (R. 179–180).[1] He was then asked (R. 180):

> XQ. And at that time, sir, whether or not you had occasion to sign any statements? A. The only thing I signed was a piece of paper saying I was in the bank. I didn't sign anything, I just——
>
> XQ. All right, you didn't sign it.

Staula testified that this was his only interview with any F.B.I. agents and that he had not related his story to anybody else (R. 180–181). Following this, he was extensively cross examined relating to his identification of Lester's picture at the time of his visit to the gas station with the police but without the F.B.I. (R. 181–199, see *supra*, p. 6). Without any further testimony concerning the giving of a statement, defense counsel demanded the production of the Staula "statement". The following ensued (R. 199):

> Mr. Louison [defense counsel]: Your Honor, at this time we should like to request under the statute Public Law 85–269 of the 85th Congress, the statement of this man.
>
> The Court: I am denying it because you have laid no foundation for it as you did the last

[1] He later said he met the F.B.I. the day he went to the gas station with the police (R. 193).

.time;[2] this man said nothing was ever read back to him, so I am denying it and your rights are saved.

The following cross examination then took place:

XQ. Now, Mr. Witness, when you said you had a conversation with the FBI some time less than a week after July 18, 1957, did they write down what you had to say to them?

The Court: If you know.

The Witness: Yes.

XQ. And did they read it back to you, sir? A. Yes.

XQ. And did they ask you if that was essentially what you had just related to them? A. Yes.

XQ. And did you tell them yes? A. Yes.

XQ. And you adopted that as your——?

Mr. Koen [Assistant United States Attorney]: I pray your Honor's judgment.

Mr. O'Donnell [defense counsel]: All right, I will strike that. Now, we move again, your Honor, under the——

The Court: I will order it produced. There is a foundation laid for it.

A conference then took place at the bench (R. 200):

The Court: Will you come up here, Mr. Witness?

(The Witness complied.)

The Court: Now, Mr. Witness, you testified here on cross examination that you talked to

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[2] The court was obviously referring to F.B.I. reports concerning interviews with the witness Yates which were turned over to the defense when Yates said they were substantially what he had told the agent (R. 76–77, 92–105).

the FBI Agent and that he asked you questions, as I remember it, and that you didn't know what he had written down because it was not read back to you. Didn't you testify that way?

The Witness: I didn't remember. Since then I have recollected. He didn't actually ask me questions. I mean, at first I told him the story, and then when I got through he asked me a few questions.

The Court: Well, did he read it back to you?

The Witness: I believe he did.

The Court: What is your best memory of it?

The Witness: I am pretty sure he did.

The Court: Is your memory such as to enable you to say that what was read back to you was an accurate statement of what you told him?

The Witness: Yes.

In the colloquy which followed, government counsel stated that the witness could not have adopted the document they had in their possession because it was not in existence at the time he was being questioned. The court said that it would permit the witness to do what the other witness had done (R. 201), referring to the procedure whereby the witness Yates was shown an F.B.I. report which he said was substantially what he had related to the agent, following which that report was admitted and made the basis of cross examination (R. 76–77, 92–105). At this juncture the witness interrupted (R. 201–202):

The Witness: If you will excuse me, I am trying to rack my brain to think about what happened. I think they wrote down what I said, and then I think they gave it back to me to read over, to make sure that it was right.

> And I think I had to sign it. Now, I am not sure. I couldn't remember before——
>
> The Court: And he said it was read back to him. So if that is a transcript——
>
> Mr. Hubley [Assistant United States Attorney]: It isn't. It is a report by an FBI Agent, which is a summary of the result of the interview. It is his interpretation of what happened.
>
> The Court: Have you got in your possession any statement that was copied by an FBI Agent which in any way would reflect a statement that this witness made and which he substantially adopted as the statement?
>
> Mr. Hubley: No, your Honor, we don't.

The court then asked for and received the F.B.I. report of Special Agent John F. Toomey (set forth at R. 212–213) which the witness was requested to read. Rejecting the government's contention that the investigational report was not producible under any circumstances, the judge said that he was going to ask Staula to read it and, if the witness said it was substantially what he had said, he was going to permit the report to be offered (R. 202–203; see also R. 209–210).

Staula was later[3] placed on the stand and asked

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[3] In the interim there was a conference in chambers (see R. 211), which was transcribed, but which was not in the record before the court of appeals. We have filed the transcript with the Clerk (it is referred to in this brief as "Tr."). Government counsel stated several times that the original notes by the F.B.I. agent were no longer in existence and that there never had been a written statement by this witness (Tr. 1805, 1811, 1818–1820). Petitioners' counsel expressed the opinion that the agent should be examined (Tr. 1832) and the court

by the court to read the F.B.I. report. When asked whether he had previously seen the document, the witness said "No" (R. 205). When asked whether it was substantially verbatim what he had told the agent, the witness answered, "No, it is not." (R. 206). The court said he would exclude the report. The following colloquy took place (R. 206–207):

> The Court: Now you want to make an objection?
>
> Mr. Louison: Yes, for the failure to produce the original document without which this witness answered questions, we move to strike this witness' entire testimony from the record.
>
> The Court: Well, I'll deny that.
>
> Mr. Louison: Objection.
>
> The Court: That's right, that's all right.
>
> Mr. Louison: And we make a common law demand for that document at this time.
>
> The Court: All right.
>
> Mr. Koen: For what document?
>
> Mr. Louison: That document.
>
> Mr. O'Donnell: That the witness just read allegedly.
>
> Mr. Koen: And I refuse.
>
> The Court: If he refuses, I have no power to order it.
>
> Mr. Koen: I refuse the common law demand.
>
> The Court: All right. So there we have it.

The United States Attorney stated that "in refusing to accede to the common law demand made by the defendants, it is the position of the Government that,

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pointed out that the government could not call the F.B.I. agents if they could not give admissible evidence, but that the defense had the names (Tr. 1836).

in view of the witness' answer to the Court's question, this document is not a document which properly can be used to impeach the witness because the witness said it is not a verbatim copy of the statement that he made" (R. 207).

The court then asked the witness if he meant that the document did not include the matters which the witness had told the agent. The witness replied, "That's not written up just the way the story is," and said, "There are things in there turned around" (R. 207).

The district court sealed the document for the court of appeals.[4] The case was submitted to the court of appeals before this Court's decision in *Palermo* v. *United States*, 360 U.S. 343, and in that court petitioners argued only that the F.B.I. report should have been turned over to them. On the basis of the *Palermo* decision the court of appeals held that there was no error in failing to turn over the F.B.I. report since it was not a statement of the witness as defined in 18 U.S.C. 3500(e).

SUMMARY OF ARGUMENT

The original notes of the F.B.I. agent's interview with the witness Staula had been destroyed after preparation of the agent's report, in accordance with the usual practice—as the trial judge fully recognized. No bad faith on the part of the government was asserted by petitioners or found by the court. Petition-

[4] It was apparently opened during the course of appellate proceedings and is printed in the record before this Court (R. 212–213).

ers' concern then turned to the agent's report. This was produced by the government to the court *in camera*. The judge examined it, and out of the jury's presence asked Staula (who had not previously seen the report) whether he adopted or accepted it. On the latter's rejection of the report as an accurate résumé of his statement to the agent, the court refused to turn over the report to the defense. The court also refused to strike Staula's testimony. These rulings were correct in the circumstances of this case.

I

The court properly rejected petitioners' demand that it turn over to the defense the F.B.I. agent's report, since Staula testified that the report was not a substantially verbatim account of what he had told the agent, was "not written up just the way the story is", and "[t]here are things in there turned around" (R. 205–206, 207). In these circumstances, the report did not fulfill the requisites of 18 U.S.C. 3500(e)(1) or of 18 U.S.C. 3500(e)(2), and was therefore not producible to the defense, either under the statute or otherwise. *Palermo* v. *United States*, 360 U.S. 343.

The mandatory provisions of the Jencks Act cannot be overruled, as petitioners attempt to do, by the claim that the report is now the best available evidence of the agent's handwritten notes which would have been producible under the statute if they were available at the trial. In addition to the serious question in this record as to the producibility of the notes (if they had been preserved), there is the crucial fact that the petitioners themselves failed to produce the best evidence

of what Staula told the agent—as they could have done by calling the agent (who was known and available to them). Their refusal to do so bars, at the outset, their effort to avoid the provisions of 18 U.S.C. 3500.

It is also important to note that the trial judge—who examined the agent's report and knew from his own knowledge, as well as from Staula's testimony and statements at the trial, that there were some discrepancies between the report and the witness' trial evidence—could have himself questioned Staula further or called the agent, if the judge had been disturbed about the differences. Trial judges, who in our system are the impartial masters of the trial, have this kind of authority to protect a defendant and insure truthful testimony—under 18 U.S.C. 3500 and the court's general powers—so long as they do not hand over a non-producible statement to the defense in violation of Section 3500. But in this case the judge did not deem it necessary to take such steps; and there is no reason to question his judgment since the so-called inconsistencies are easily explainable on grounds not going to the significant issues in the trial. Petitioners dwell, particularly, on the fact that the report does not indicate that Staula identified petitioner Lester in the F.B.I. interview, while he did so at the trial. The explanation is simply that Staula was not shown a picture of Lester, which he then identified as one of the robbers, until *after* his interview with the F.B.I. when local police interviewed him further; F.B.I. agents were not present at this identification. In these circum-

stances, the F.B.I. report had little bearing on the critical aspect of Staula's testimony, and it is hardly surprising that the report did not refer to or suggest any identification of Lester.

II

The fact that the F.B.I. notes of the interview with Staula were not kept would not require the striking of Staula's trial testimony under 18 U.S.C. 3500. When Section 3500(b) refers to a producible statement "in the possession of the United States",[5] it obviously means in the possession of the government at the time production is called for, unless perhaps destruction or loss of a pre-existing document is due to bad faith. Here, there is no such suggestion, and, as we have pointed out, petitioners did not call the agent, either to inquire into bad faith or to discuss what actually transpired at the interview with Staula. Without utilizing that available avenue (at the least), petitioners are in no position to call for imposition of the drastic sanction of striking testimony which Section 3500 imposes only for failure to obey an order of the court to hand over a producible statement.

III

In any event, error with respect to the court's rulings on the F.B.I. report would constitute reversible error only as to petitioner Lester. The only

[5] We do not agree that on this record petitioners have shown that the agent's notes constituted a producible statement under 18 U.S.C. 3500.

significant aspect of Staula's testimony incriminated Lester alone.

ARGUMENT

INTRODUCTION

The situation which confronted the trial judge in relation to petitioner's demand for production of the statement of the witness Staula was this:

1. The original notes of the F.B.I. agent's interview with Staula, which the witness thought had been read back to him and might have been signed by him, had been destroyed and were not in existence at the time of trial.[6] There was, as the court observed in chambers (Tr. 1836), nothing unusual about the fact that the notes were destroyed after the agent's report was made. As pointed out by the government in *Needelman* v. *United States*, 362 U.S. 600, the personal handwritten notations of the agent—which are one of the bases of his formal report for his colleagues, superiors, and the files—are subject to all the variations attendant on a personal means of recollection and do not normally furnish a firm basis for consideration of the facts by others in the course of the investigation of a case. It is the report, rather than the agent's own notes, which is customarily passed on to others. For this reason, although such notes are sometimes kept by the agent, they are more often destroyed after his in-

[6] While this is not made specific in relation to Staula in the record as printed, the court accepted the assurances of government counsel to that effect in the conference in chambers (Tr. 1805, 1811, 1816, 1818, 1836), and petitioners do not suggest that this was not the fact. (And see R. 65, where the United States Attorney stated that the F.B.I. did not have the notes of the interview with the witness Yates.)

vestigative report has been prepared. It would be most difficult, if not physically impossible, for the government to keep for years all the personal notes of its various agents, as well as all reports.[7]

In particular, in relation to the interview with Staula, there was no reason why an F.B.I. agent should have deemed his own notes worthy of being kept for subsequent trial purposes. Staula's interview with the F.B.I. was at noon, and therefore before Staula identified petitioner Lester's picture to the police (not the F.B.I.) at the gas station in the afternoon. From the F.B.I. interview, before the pictures were shown to Staula, the information gathered which could prove useful for future investigation was simply Staula's description of the man in the blue suit (the man whom Staula at the trial could identify only to the extent of saying that Arnold Campbell resembled him). This is reflected in the space devoted to this description in the formal report subsequently made by the F.B.I. agent. Staula's role as a potential witness became truly significant and assumed importance only when he identified Lester, an event which occurred after the F.B.I. interview and was made to persons other than the F.B.I.

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[7] The interview here occurred in July 1957, very shortly after the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657, and before enactment of 18 U.S.C. 3500, so that procedures had still not crystallized. Every effort is being made by the F.B.I. to comply with the statute and to get statements or reports in a form that would render them producible under 18 U.S.C. 3500. It is, however, not deemed feasible to preserve all personal notes taken by the agents.

2. The judge had first ruled that, since the witness thought the notes had been read back to him and he might have signed them, the court would turn them over to the defense if they were available (R. 209). When the notes were shown not to be available, the judge endeavored to deal with the situation in a practical way by discovering whether the witness would adopt the report of the F.B.I. agent (Tr. 1820, 1830–1, 1832; R. 209–210) which the government produced to the court *in camera*. The witness, however, read the report (which he had not previously seen) and stated that it was not his and was not substantially verbatim what he had told the F.B.I. agent. Under those circumstances (as we discuss in more detail, *infra*, Point I), the judge properly ruled that he could not turn over the report to be used as a basis for cross-examination of the witness. 18 U.S.C. 3500; *Palermo v. United States*, 360 U.S. 343.

3. Petitioners' counsel then requested the court to strike Staula's testimony because the agent's original notes could not be produced, and because the F.B.I. summary, which was available, did not constitute a proper basis for cross-examination of the witness. We show in Point II, *infra*, that the court's refusal to strike the testimony was wholly correct. And in Point III, we show that, in any event, error with respect to the report of the interview with Staula would affect only petitioner Lester.

I

THE TRIAL COURT PROPERLY REFUSED TO TURN OVER THE F.B.I. AGENT'S REPORT OF THE INTERVIEW WITH THE WITNESS STAULA, WHICH STAULA TESTIFIED WAS NOT A SUBSTANTIALLY VERBATIM ACCOUNT OF WHAT HE HAD TOLD THE AGENT

1. As the court below held, this Court's decision in *Palermo* v. *United States*, 360 U.S. 343, establishes the correctness of the trial court's ruling that the agent's summary of his interview with Staula was not a statement producible under 18 U.S.C. 3500 (e), *supra*, pp. 2–3, as a basis for the impeachment of Staula. The summary was made after the interview with Staula; and Staula had never seen it until it was shown to him at the trial, out of the presence of the jury.

When Staula was called to the stand and questioned by the court, he testified that the report was not substantially verbatim what he had told the agent. He said it was "not written up just the way the story is" and "[t]here are things in there turned around" (R. 207). Since it had not been signed, adopted or approved by Staula, it could not qualify under Section 3500(e)(1), and since it was not substantially verbatim, it did not meet the requirements of Section 3500(e)(2). The court therefore properly refused to permit its use for the purpose of impeachment of Staula.[8]

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[8] This is the same procedure which the court had initiated for determining whether the F.B.I. report relating to an interview with government witness Yates should be made avail-

2. Petitioners' suggestion to the trial court, and their argument in the court of appeals and here (Pet. Br. 13–18), that the F.B.I. report should have been produced under their "common-law" demand for the document, was answered by this Court's decision in *Palermo*, 360 U.S. 343, 349–350:

> * * * The suggestion that the detailed statutory procedures restrict only the production of the type of statement described in subsection (e), leaving all other statements, *e.g.*, nonverbatim, non-contemporaneous records of oral statements, to be produced under pre-existing rules of procedure as if the statute had not been passed at all, flouts the whole history and purpose of the enactment. It would mock Congress to attribute to it an intention to surround the production of the carefully restricted and most trustworthy class of statements with detailed procedural safeguards, while allowing more dubious and less reliable documents a more favored legal status, free from safeguards in the tournament of trials. To state such a construction demonstrates its irrationality; the authoritative legislative history precludes its acceptance.
>
> To be sure, the statute does not, in so many words, state that it is the exclusive, limiting means of compelling for cross-examination purposes the production of statements of a gov-

able to the defense. Petitioners protest that they do not understand why the Yates report was made available, but the Staula report was not. The answer is simply that Yates testified that the report was substantially correct (R. 62), thereby qualifying it under subsection (e)(2), whereas Staula said that the report relating to him was not.

> ernment witness to an agent of the Government. But some things too clearly evince a legislative enactment to call for a redundancy of utterance. One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of *Jencks* would compel the undiscriminating production of agent's summaries of interviews regardless of their character or completeness. Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations. The committee reports of both Houses and the floor debates clearly manifest the intention to avoid these dangers by restricting production to those statements specifically defined in the bill. * * *

The wisdom of the Congressional decision to restrict production to documents fairly attributable to the witness is shown by one of the examples which petitioners offer as showing the value of the report for impeachment purposes. The report states that Mr. Staula said that "he did not *observe* a third man in the bank" (emphasis added). Staula's testimony at the trial was that he knew there was a third man because he heard the man in the blue suit conversing with a third man and that he obtained a glimpse of

the third man while the men were emptying money into bags. See the Statement, *supra*, p. 5. He gave no description of the third man and never attempted to identify him. The ambiguous word "observe" is the agent's word, and may have been used, from the point of view of an agent starting an investigation, to indicate that Staula could not be helpful in tracking down the third man since he had not really seen him sufficiently to "observe" him. But it would be unfair to the witness and engender confusion to hold Staula responsible for the agent's own wording which is subject to the interpretation which petitioners in fact seek to give it, that Staula did even glimpse the third man and was not at all sure that a third man was present (Pet. Br. 13).

3. Petitioners argue that, since Staula did testify that he thought the agent had read back the notes at the time of the interview and that he might have signed them, there was once in existence a statement which would have been producible under 18 U.S.C. 3500 (as the trial court had ruled)[9] and that therefore the report should have been turned over under the secondary evidence rule. It is far from clear

[9] If the agent's notes had truly been adopted or approved by Staula, or were a substantially verbatim recital of Staula's statement to the agent, they would have been producible as the communicated statement of a government witness (Staula) in the possession of the United States. See *United States* v. *Papworth*, 156 F. Supp. 842, 853–854 (N.D. Tex.), affirmed, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854. This is to be sharply distinguished from the production of non-communicated notes of the agent to impeach the *agent's* own testimony (the situation involved in *Needelman* v. *United States*, 362 U.S. 600).

that there was ever a producible statement, since the recollection of the witness was most hazy and the F.B.I. agent (whose name was known to petitioner's counsel) was not called to state his memory of whether he had read the notes back to the witness or had him sign them (see *supra,* pp. 7–10, and *infra,* p. 26, fn. 11).

But, in any event, petitioners themselves failed to produce the best evidence. If they wished to prove precisely what Staula had told the agent, they could have called the agent and asked him. They knew that the report contained something different from Staula's testimony since Staula said it was not verbatim, was "turned around", and was "not written up just the way the story is" (*supra,* pp. 11, 12). They knew the agent's name and knew he was available. The judge indicated to them that they could call the agent, but that the government was under no obligation to do so since the agents could not give any admissible testimony on the case (Tr. 1832–1836). Having failed to call the agent, petitioners are hardly in a position to claim, on the basis of the secondary evidence rule, the right to a report which was not, on this record, the statement of the witness (or fairly attributable to him) in order to impeach him.

4. It is also important to emphasize that the F.B.I. agent's report was made available by the prosecution to the judge and to the witness Staula. The latter read it, while on the stand, and rejected its accuracy. Thus, the fact of inconsistency between the report and Staula's testimony at the trial was known to the court

and to the parties. If the judge, who had the report and read it (Tr. 1822, 1844–5; R. 206, 210), thought that this admitted inconsistency was significant enough to require further probing, he would have himself questioned Staula about the differences. In our view, the trial judge does have discretion to call for a summary report of this type and to use it to question the witness himself, or to call the agent to the stand if he deems that step appropriate, or to take such other action as appears necessary to test the witness—provided that he does not make the summary available to the defense counsel (a step which Congress has prohibited in 18 U.S.C. 3500). The judge is the impartial master of the trial; where necessary, he can protect the rights of the defendant against false or incomplete testimony and insure even-handed justice by such procedures, short of handing over the nonproducible summary or report to the defense to use as it will (a procedure which Congress has itself determined would, on balance, be harmful to the public interest).

In this case, the trial judge did not deem it necessary to take these steps, and no reason appears to question his judgment. We have already referred (*supra*, pp. 21–22) to petitioners' notation of the fact that the report states that Staula did not "observe" the third man, and shown that this was not inconsistent with Staula's testimony at the trial. The other so-called inconsistency is also not really an inconsistency. Petitioners point to the fact that, according

to the report, Staula stated that he could not give a description of the first man with the gun other than that he was a Negro, wearing gray chino pants, standing in the center of the lobby and holding a gun, whereas at the trial Staula identified Lester as that man (Pet. Br. 10). But it is certainly not an unknown phenomenon that a person cannot articulate a description and yet can identify a person when he sees him or his picture. As we have pointed out (*supra*, p. 17), the significant fact with relation to Staula's testimony was that, *later* on the same day as the interview with the F.B.I., the day after the robbery, Staula did pick out Lester's picture from among a group of pictures. As to this, petitioners did engage in extensive cross-examination (R. 181, 190); and, as to this, the interview with the F.B.I. has no bearing because no F.B.I. man was present at the picture-showing, and, at the time of the earlier F.B.I. interview, Staula had not been shown the pictures (R. 193). In the context of the significant issues in this case, Staula's initial interview with the F.B.I., before he was shown any pictures, was not important, and it was not significant that the report differed somewhat from his testimony at the trial.[10] There was thus no reason to subject him to examination on the basis of the report, particularly since he himself testified that it was not his statement.

[10] The trial judge was quite aware that the important part of Staula's testimony at the trial was his identification of petitioner Lester (see T. 1820–1821).

II

THE FACT THAT THE NOTES OF THE INTERVIEW HAD NOT BEEN KEPT WOULD NOT REQUIRE THE STRIKING OF THE TESTIMONY OF THE WITNESS

Petitioners also argue that since, on the basis of Staula's testimony that the notes had been read back to him and might have been signed, there once was a document which the court had indicated it would order produced, the failure of the government to produce the notes at the trial, for whatever reason, was the equivalent of an election not to comply with an order of the court under 18 U.S.C. 3500(d). Hence, they assert that, under that section, the court was required to "strike from the record the testimony of the witness". As indicated *supra*, pp. 22–23, we do not concede that this record adequately shows that a producible statement was ever in existence,[11] but in any event the petitioners' claim has no merit.

1. The statute refers to any statement of the witness "in the possession of the United States", 18 U.S.C. 3500(b), and necessarily means in possession of the

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[11] Staula's recollection was very unclear as to just what happened: his final testimony on the point shows this (R. 201):

> If you will excuse me, I am trying to rack my brain to think about what happened. I think they wrote down what I said, and then I think they gave it back to me to read over, to make sure that it was right. And I think I had to sign it. Now, I am not sure. I couldn't remember before—

This is hardly the "complete foundation" for production of the notes which petitioners assert as the basis of their argument; and, as we have pointed out, they made no attempt to call the F.B.I. agent to discover more precisely what did happen.

United States at the time production is called for. A party cannot be called upon to produce that which he does not have. This self-evident proposition is well grounded in the law of discovery. *Societe Internationale* v. *Rogers*, 357 U.S. 197; *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 347; *Fisher* v. *United States Fidelity & Guaranty Co.*, 246 F. 2d 344 (C.A. 7); *Victor G. Bloede Co.* v. *Joseph Bancroft & Sons*, 110 Fed. 76 (C.C.D. Del.); *Despeaux* v. *Pennsylvania R. Co.*, 149 Fed. 798 (C.C. E.D. Pa.). If, for example a statement clearly producible under 18 U.S.C. 3500 was accidentally destroyed by fire, that would be no reason for not using the living testimony of the witness. Our system of trial rests on the assumption that the live testimony of a witness, under oath subject to cross-examination, is superior to an *ex parte* statement made not under oath. The *ex parte* statement may or may not be useful in cross-examination of the witness, for impeachment purposes, but the mere fact that it is not in existence does not mean that the testimony of the witness should not be received.

2. If a party willfully destroys evidence relating to a contested issue, he may be subject to a presumption that the evidence would have been unfavorable to his cause. Conceivably if a court found that a producible statement of a witness had been destroyed for improper motives, it could regard destruction as the equivalent of non-compliance with an order to produce under 18 U.S.C. 3500(d), and preclude the government from using the testimony of the witness whose statement had been so destroyed. But petitioners made no attempt to show any improper action by the

United States, or that the destruction of the notes was in bad faith. They did not even try to discover why the notes were not in existence. Before petitioners could seek to invoke the drastic remedy of keeping from the jury the relevant testimony of a witness who was before the jury and subject to cross-examination, on the basis of the fact that the notes of an interview with the witness were not in existence, it would be incumbent upon them to show that the non-existence of the notes was the result of bad faith on the part of the government. Petitioners made no such attempt, and the court quite clearly accepted the reasonable explanation that notes of this type are most frequently destroyed after the agent has drawn up his report (see *supra*, pp. 16–17).

3. Moreover, there would be no reason to strike the testimony of the witness since petitioners did not exhaust the remedies that were available to them to find out what had transpired at the interview. As pointed out *supra*, p. 23, they knew the name of the agent who had interviewed Staula and knew that he was available. There was thus no reason why, if they had deemed the matter of significance, they could not have endeavored to call the agent as a witness. They did not choose to do so. Whatever their reasons for not taking this course—whether it was because they realized that any differences would not be significant since Staula's identification of Lester came *after* the F.B.I. interview, or for some other reason—they could not justifiably attempt to hold the government to the penalty of striking testimony (imposed by the statute for failure to obey an order of the court), without

attempting to go as far as they could in attempting to find out what had transpired at the F.B.I. interview.

4. Finally, as we have also pointed out, *supra*, pp. 17, 24–25, the interview of the F.B.I. with Staula is of little significance in relation to Staula's identification of Lester since that identification came later when Staula picked out Lester's picture at a time when F.B.I. agents were not present. Accordingly, since the interview had no real bearing on the crucial part of Staula's testimony, there would be no reason to strike the testimony of Staula because the notes of the interview had been destroyed.

III

ANY ERROR IN RESPECT TO THE RULING ON THE F.B.I. AGENT'S REPORT OF THE INTERVIEW WITH STAULA WOULD CONSTITUTE REVERSIBLE ERROR ONLY AS TO LESTER

There was very little in Staula's testimony which incriminated the petitioners other than Lester. Staula thought that Arnold Campbell resembled the man in the blue suit (R. 145). However, this gave no weight to the case against this petitioner, since the other government witnesses identified this man as Alvin Campbell (Pet. Br. 11, fn. 8). Testimony which, on its face, was negligible thereby lost all its probative value; confusion in identification is always helpful to the defense. Staula did not attempt to identify the third man, of whom he only caught a glimpse (R. 143). The sole significance of the Staula testimony thus relates only to petitioner Lester, so that the

question here presented in no way affects the other petitioners.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 53.—October Term, 1960.

Alvin R. Campbell, Arnold S. Campbell and Donald Lester, Petitioners, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January 23, 1961.]

Mr. Justice Brennan delivered the opinion of the Court.

After a government witness testifies on direct examination in a federal criminal prosecution the trial court is required, under the so-called Jencks Act,[1] on motion of the defendant, to order the United States to produce, for

[1] 18 U. S. C. § 3500. *Demands for production of statements and reports of witnesses.*

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised,

impeachment purposes, defined pretrial statements of the witness, or parts of such statements as determined under subsection (c), which relate to the subject matter of his trial testimony and are in the possession of the United States. The conviction of the petitioners in the District Court for the District of Massachusetts for bank robbery in violation of 18 U. S. C. § 2113 was sustained by the Court of Appeals for the First Circuit. 269 F. 2d 688. During the trial the court ordered the government to produce a document described on cross-examination by one

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the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." Added by Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

of its witnesses in terms which satisfy the definition of a "statement" under the Act. The government denied having possession of such a document. It did, however, admit posssession of an Interview Report of an interview of an FBI agent with that witness, but contended that this report fell outside the statute. The trial judge held an inquiry without the jury present, at the conclusion of which he refused to order the United States to deliver the Interview Report to the petitioners, and also denied their motion to strike the testimony of the witness. The procedure at that inquiry raises questions important in the administration of the Jencks Act, and we granted certiorari limited to the review of those questions. 362 U. S. 909.

The government witness was Dominic Staula, a depositor who was in the bank at the time of the robbery. On direct examination he identified the petitioner Lester as one of the robbers. When asked on cross-examination whether he made any statements to government agents before the trial, he said that an agent of the Federal Bureau of Investigation who interviewed him during the week following the robbery wrote down such a statement. His recollection of what occurred at the interview was not entirely clear,[2] but the trial judge ruled that he had made

[2] The pertinent parts of his testimony are as follows:

"XQ. Now, Mr. Witness, when you said you had a conversation with the FBI some time less than a week after July 18, 1957, did they write down what you had to say to them?

"The COURT: If you know.

"The WITNESS: Yes.

"XQ. And did they read it back to you, sir? A. Yes.

"XQ. And did they ask you if that was essentially what you had just related to them? A. Yes.

"XQ. And did you tell them yes? A. Yes.

"The COURT: I will order it produced. There is a foundation laid for it.

"The WITNESS: . . . He didn't actually ask me questions. I

a statement satisfying the requirements of the Jencks Act and ordered the United States to produce it. The Assistant United States Attorney presenting the government's case stated that he had no such paper as the witness described. He stated further that the only document in the possession of the prosecution was not a "statement" within the statute, being a typed Interview Report [3] of

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mean, at first I told him the story, and then when I got through he asked me a few questions.

"The COURT: Well, did he read it back to you?

"The WITNESS: I believe he did.

"The COURT: What is your best memory of it?

"The WITNESS: I am pretty sure he did.

"The COURT: Is your memory such as to enable you to say that what was read back to you was an accurate statement of what you told him?

"The WITNESS: Yes.

"The WITNESS: If you will excuse me, I am trying to rack my brain to think about what happened. I think they wrote down what I said, and then I think they gave it back to me to read over, to make sure that it was right. And I think I had to sign it. Now I am not sure. I couldn't remember before—"

[3] The District Court sealed the Interview Report for the Court of Appeals. The Court of Appeals released it and it is in the record here. The full text is as follows:

"Federal Bureau of Investigation Interview Report

"Mr. Dominic Staula, home address 259 Island Street, Stoughton, Massachusetts, a customer at the victim bank, advised that he arrived at the Norfolk County Trust Company in Canton, Massachusetts, to transact some business at approximately 10:15 A. M., July 18, 1957. Mr. Staula stated that he was driving a truck and parked it beside the Canton Depot in the parking area located between the railroad depot and the bank. He stated that he noted nothing unusual when he entered this parking area nor did he notice anything unusual in walking from where he parked his vehicle to the bank.

"It was stated by Mr. Staula that he went to the teller's window which is served by Mr. Kennedy and while standing in line at this

FBI Special Agent Toomey prepared and transcribed after the interview at a time unknown to the Assistant. The Assistant refused to deliver the report to petitioners' counsel but delivered it to the judge for his inspection. To the court's question whether the government

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window, but before being waited upon by Mr. Kennedy, he heard somebody state from behind him 'Over against the wall.'

"Mr. Staula stated that he looked around and observed a man whom he described as being a negro, wearing gray chino pants, standing in the center of the lobby and holding a gun. Staula stated that he immediately realized that the bank was being held up and at once took his deposits which consisted of cash and slid them into his side trouser pocket.

"Mr. Staula went on to state that he only observed the man standing in the center of the lobby for an instant and could give no further description of him because he turned toward the front of the bank and observed another man standing there holding a gun. Staula stated that he looked at this man for a short period of time and described him as follows:

"Property of FBI.—This report is loaned to you by the FBI, and neither it nor its contents are to be distributed outside the agency to which loaned.

Sex	Male.
Race	Negro.
Age	Approximately 30 years.
Height	5' 10".
Weight	165 pounds.
Complexion	Very dark.
Build	Slender.
Face	Round.
Clothing	Dark blue suit.
	Blue snap brim hat.
	White shirt.

"Mr. Staula stated that he did not observe a third man in the bank—

"It was stated by Mr. Staula that he did not know what type of gun was carried by these two individuals whom he observed but believed that they could have been 45 caliber automatics.

"Mr. Staula stated that after taking a look at the individual wear-

possessed "any statement which was copied by an FBI agent which in any way would reflect a statement that this witness made and which he substantially adopted as the statement," the Assistant replied "No, your Honor, we don't." To the further question whether "the United States [has] in its possession any notes that were taken down by the FBI agent at the time this witness was interviewed," the Assistant answered, "I do not have them in my possession and I do not know whether they ever existed."

The Jencks Act limits access by defendants to such government papers as fit the Act's definition of "statements" which relate to the subject matter as to which the witness has testified. *Palermo* v. *United States*, 360 U. S. 343. However, the statute requires that the judge *shall*, on motion of the defendant, after a witness called by the United States has testified on direct examination, order the United States, for impeachment purposes, to produce any such "statements." To that extent, as the legislative history makes clear, the Jencks Act "reaffirms" our

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ing the blue suit he faced the wall as previously ordered and observed these individuals no further.

"He stated that after he stood with his face to the wall for approximately 10 minutes one of the robbers ordered him and the other people who were standing on either side of him to walk into the vault. He stated that he does not recall which of the robbers issued this order but that he did enter the vault as directed and observed these individuals no further.

"Mr. Staula stated that one of the robbers, closed the door of the vault he issued some order to the effect that the people locked inside should not leave and that they stayed there for 5 or 10 minutes until the vault door was opened by Sergeant Ruane of the Canton, Massachusetts, Police Department."

"Interview with Dominic Staula, File # 91-952, on July 19, 1957, at Canton, Massachusetts, by Special Agent John F. Toomey, Jr., bjp."

holding in *Jencks* v. *United States*, 353 U. S. 659, that the defendant on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and competent statements of a government witness in possession of the government touching the events or activities as to which the witness has testified at the trial. S. Rep. No. 981, 85th Cong., 1st Sess., p. 3. And see H. R. Rep. No. 700, 85th Cong., 1st Sess., pp. 3–4. The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary are the special guardians.

After an overnight recess the trial judge conducted an inquiry without the jury present to take testimony and hear argument of counsel. Plainly enough this was a proper, even a required, proceeding in the circumstances. Determination of the question whether the government should be ordered to produce government papers could not be made from a mere inspection of the Interview Report, but only with the help of extrinsic evidence. The situation was different from that governed by subsection (c), in which the government admits that a document in its possession is a "statement" but submits the paper for the judge's *in camera* inspection to delete matter which the government contends does not relate to the subject matter of the testimony of the witness. The situation was similar to that in *Palermo*, where the government also contended that a paper in its possession was not a "statement." We there approved the procedure of taking extrinsic testimony out of the presence of the jury to assist the judge in reaching his determination whether to order production of the paper. We said, p. 355, "It is a function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement."

In this case the aid of extrinsic evidence was required to answer the following questions bearing on the petitioner's motions:

> Did Toomey write down what Staula told him at the interview? If so, did Toomey give Staula the paper "to read over to be sure it was right," and did Staula sign it?
>
> Was the Interview Report the paper Staula described, or a copy of that paper? In either case, as the trial judge ruled, the Interview Report would be a producible "statement" under subsection (e) (1). "Statements" under that subsection are not limited to such as the witness has himself set down on paper. They include also a statement written down by another which the witness "signed or otherwise adopted or approved" as a statement "made by said witness." True, the report does not bear Staula's signature and the witness testified he "thought he signed" the original paper. However, if the paper was otherwise adopted or approved by the witness, his signature was not essential. See *Bergman* v. *United States*, 253 F. 2d 933, 935, note 1; *United States* v. *Tomaiolo*, 280 F. 2d 411, 413.
>
> If the Interview Report was not the original or a copy of the paper Staula described, what became of the paper?
>
> In any event, even if the Interview Report was not the original or a copy of the paper Staula described, had Staula read over and approved the Interview Report? In such case the report would be producible under subsection (e) (1) although not related to the paper Staula described. Or was the Interview Report a substantially verbatim recital of an oral statement which the agent had recorded contemporaneously? If extrinsic evidence established that the report would be producible under subsection (e)(2). *Palermo* v. *United States*, 351-352.

The obvious witness to call was Special Agent Toomey who, the parties agreed, was readily available. Defense counsel suggested that the agent be called "to explain where he got the . . . [Interview Report]," and also because "Mr. Toomey could easily say what he has done with the original writing." Defense counsel were not in a position also to appreciate the significance of Toomey's testimony to the possible producibility of the Interview Report itself. Consistently with our admonition in *Palermo*, 360 U. S., at 354, that "It would indeed defeat this design [to limit defense access to government papers] to hold that the defense may see statements in order to argue whether it should be allowed to see them," neither the government nor the judge permitted them to inspect it. From his own inspection, however, the judge was aware of the significance which Toomey's evidence might have on the judge's determination whether he should order the government to turn over the Interview Report to the defense. The Interview Report resembles the statement Staula described and the judge indicated that he would order its production if it was that statement or a copy of it, or although not the original or a copy, if Staula had read and approved it, or if it was a contemporaneously recorded substantially verbatim recital of Staula's oral statement. Nevertheless, the judge ruled that it was for the petitioners to subpoena Toomey as "their witness" if they believed his testimony would support their motions, and that he would not of his own motion summon Toomey to testify, or require the government to produce him. We think that this ruling was erroneous.

The inquiry being conducted by the judge was not an adversary proceeding in the nature of a trial controlled by rules governing the allocation between the parties of the burdens of proof or persuasion. The inquiry was simply a proceeding necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute. The function of prosecution and defense at the

inquiry was not so much a function of their adversary positions in the trial proper, as it was a function of their duty to come forward with relevant evidence which might assist the judge in the making of his determination. These considerations standing alone suggest that the emphasis on the petitioners' burden to produce the evidence was misplaced. The statute says nothing of burdens of producing evidence. Rather it implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute—the interest of the government in safeguarding government papers from disclosure, and the interest of the accused in having the government produce "statements" which the statute requires to be produced.

The circumstances of this case clearly required that the judge call Toomey of his own motion or require the government to produce him. Not only did the government have the advantage over the defense of knowing the contents of the Interview Report but it also had the advantage of having Toomey in its employ and presumably knew, or could readily ascertain from him, the facts about the interview. In addition to the consideration that the interest of the United States in a criminal prosecution ". . . is not that it shall win a case, but that justice shall be done . . . ." *Berger* v. *United States*, 295 U. S. 78, 88, the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary. *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253, 256, note 5. Moreover, the petitioners' cross-examination of Staula had shown a *prima facie* case of their entitlement to a statement, and, at the least, the judge should have required the government to come forward with evidence to answer that case. Cf. *United*

States v. *Costello*, 145 F. Supp. 892, 894–895, note 13. Since the Interview Report was not, and under *Palermo* could not be, made available to the petitioners, and they thus had no way of knowing the significance of its contents to the question the judge was to determine, it saddled an unfairly severe burden on them to require them to subpoena Toomey as "their witness." In the role of petitioners' witness, they would be groping in the dark in questioning him, and they might be bound by his answers. As a witness called by the government or even as the court's witness, they would have a latitude in cross-examination to which the circumstances entitled them.

Instead of calling Toomey or having the government call him, the trial judge fell into further error by relying upon Staula to supply the information he sought. Over the objection of government counsel that the Interview Report had not been "recorded contemporaneously with the making of such oral statement," and over the objection of the petitioners that "if this man now reads that statement it loses its effect for purposes of impeachment," the judge directed Staula to read the Interview Report and say whether he was familiar with it. The witness said that he had never seen the report. The judge then asked Staula ". . . is that a substantially verbatim recital of what you told agent Toomey?" The witness replied, "That's not written up just the way the story is." "There are things in there turned around." It was after this testimony was elicited from Staula that the judge ruled he would not order the delivery of the Interview Report to the petitioners, and denied their motion to strike the witness' testimony.

Reliance upon the testimony of the witness based upon his inspection of the controverted document must be improper in almost any circumstances. The very question being determined was whether the defense should have the document for use in cross-examining the witness.

Under *Palermo*, the trial judge was not to allow the defense to inspect the Interview Report "in order to argue whether it should be allowed to see" it, since to do so would be inconsistent with the congressional purpose to limit access to government papers. Similarly, Staula should not have been allowed to inspect the Interview Report, since there necessarily inhered in the witness' inspection of the paper the obvious hazard that his self-interest might defeat the statutory design of requiring the government to produce papers which are "statements" within the statute. For example, the Interview Report states that Staula was unable to give any description of one of the robbers. This is in sharp contrast to his positive identification of Lester made on direct examination. Experienced trial judges and lawyers will readily understand the value of the use of the report on cross-examination of the witness. But the petitioners were deprived of the opportunity to make use of the report by the obviously self-serving declarations of the witness that it did not accurately record what he told the agent.

Moreover, failure of the judge to call for Toomey's testimony foreclosed a proper determination of the petitioners' motion to strike the witness' testimony. If the Interview Report was not the original or a copy of the paper Staula described, and that paper was destroyed, the petitioners were denied a statement to which they were entitled under the statute. Thus, even if the Interview Report itself were producible, a situation might have arisen calling for decision whether subsection (d) of the statute required the striking of the testimony of the witness. The parties argue whether destruction may be regarded as the equivalent of noncompliance with an order to produce under that subsection. The government contends that only destruction for improper "motives" or in bad faith should be so regarded. The petitioners contend that destruction without regard to the circumstances

should be so regarded. However, this record affords us no opportunity to decide this important question of the construction of subsection (d). We do not yet know that such a paper existed, and was destroyed, or the circumstances of its destruction, nor can we know without the benefit at least of Toomey's testimony.

We conclude that because of these errors in the conduct of the inquiry the petitioners are entitled to a redetermination of their motion for the production of Staula's pretrial statements, and of their motion to strike his testimony. However, we do not think that this Court should vacate their conviction and order a new trial. The petitioners' rights can be fully protected by a remand to the trial court with direction to hold a new inquiry consistent with this opinion. See *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233. The District Court will supplement the record with new findings and enter a new final judgment of conviction if the court concludes upon the new inquiry to reaffirm its former rulings. This will preserve to the petitioners the right to seek further appellate review on the augmented record. On the other hand, if the court concludes that the Government should have been required to deliver the Interview Report or other statement to the petitioners, or that it should have granted their motion to strike Staula's testimony, the court will vacate the judgment of conviction and accord the petitioners a new trial.

The judgment of the Court of Appeals is therefore vacated and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 53.—October Term, 1960.

Alvin R. Campbell, Arnold S. Campbell and Donald Lester, Petitioners, v. United States.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January 23, 1961.]

Mr. Justice Frankfurter, whom Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker join, dissenting in part and concurring in the result in part.

What is this case? In the course of a prosecution for violation of the Federal Bank Robbery Act, 18 U. S. C. § 2113, Dominic Staula, a government witness, identified defendant Lester as one of three men whom he had observed committing the alleged offense. Upon cross-examination, he disclosed that, on one occasion at local police headquarters, he had been interviewed by at least two FBI agents. He stated that he did not sign any statements, but only signed "a piece of paper saying I was in the bank." On the basis of this testimony the defense requested "the statement of this man" under the Jencks Act, 18 U. S. C. § 3500, which requires that the court order the Government to produce "any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." The trial judge denied this request on the ground that the defense had "laid no foundation for it" since "this man said nothing was ever read back to him." No exception was taken to this ruling. In the continuing cross-examination that followed, Staula changed his testimony by recalling that the agents had written down what he had told them, that "it" was read back to him, and that he had told the agents "it" was "essentially what [he] . . . had just related to them."

The judge then held *sua sponte* that a foundation had been laid for an order to the Government to produce the described document, and ordered the document produced. A colloquy at the bench followed, in the course of which Staula explained to the judge that since his earlier testimony he had recollected what had taken place; that he "believed" or was "pretty sure" that "it" had been read back to him; that what was read back was an accurate statement of what he had told the agents; that he thought they gave "it" back to him to read over and that he had to sign it, although he was not "sure." Government counsel stated at the bench that the only document in their possession was a "summary of the result of the interview" which represented the FBI agent's "interpretation of what happened." The judge then asked whether the Government possessed "any statement that was copied by an FBI agent which in any way would reflect a statement that this witness made and which he substantially adopted as the statement," to which government counsel replied "No, your Honor, we don't." A moment later the judge again asked, "Has the United States in its possession any notes that were taken down by the FBI agent at the time this witness was interviewed?" Government counsel answered "I do not have them in my possession and I do not know whether they ever existed." The judge then asked for and received the FBI agent's report referred to by the United States Attorney, and the case was adjourned for the day.

The following morning during a conference held in the judge's chambers the Government again asserted that the agent's report was not a copy of the original notes, and that the notes were no longer in existence. A long discussion ensued concerning the producibility of the agent's report. Defense counsel suggested that the FBI agent (Toomey) be called into chambers "to explain where he got the document," and to "say what he has done with

the original writing." This the judge denied, but suggested that the defendant was free to subpoena the agent, or, more simply, could ask the Government to have the agent made available for examination. The judge then proposed to ask Staula, out of the presence of the jury, whether the report was a substantially verbatim recital of what he had told the agent; and, if the answer were affirmative, the report would be given to defendant for impeachment purposes. Both sides opposed this move. The Government argued that in any event the report had not been "recorded contemporaneously with the making of such oral statement," and defendant's counsel objected because the impeachment value of the report would be negated by having the witness see the document and himself decide whether it conformed to what he had told the FBI. But Staula was shown the document. He denied that it was a "substantially verbatim recital of what [he] . . . told Agent Toomey," and the judge thereupon denied the defense access to the document for purposes of impeachment. Thereupon defendant moved that, in accordance with the Act, Staula's entire testimony be stricken because the Government had failed to produce "the original document." This motion was denied.

The case presents two entirely separate questions under the Jencks Act, and they should be kept apart. What are the procedural requirements, under the Jencks statute, when counsel for the United States announces that he cannot produce documents for which a foundation has been laid because he does not possess them and does not know of their existence? Secondly, was the FBI agent's available report producible under the Act?

I.

Title 18 U. S. C. § 3500 requires the trial judge, upon a motion by the defendant, to "order the United States to produce any statement . . . of the witness in the

possession of the United States" which is relevant to the direct testimony of the government witness. Nothing in the legislative history of the Act remotely suggests that Congress' intent was to require the Government, with penalizing consequences, to preserve all records and notes taken during the countless interviews that are connected with criminal investigation by the various branches of the Government. The legislation narrowed the application of our decision in *Jencks* v. *United States*, 353 U. S. 657, as construed by some of the lower courts, partly by having the relevancy of the material determined by the district judge prior to its production. S. Rep. No. 981, 85th Cong., 1st Sess., p. 2.

Petitioner's contention that the words "in the possession of" must be interpreted as meaning "possession at any prior or present time" must be rejected. Congress surely did not intend to initiate a game of chance whereby the admission of a witness' testimony is made to depend upon a file clerk's accuracy or care. Senator O'Mahoney, the sponsor of the bill, in illustrating that his measure approved the essential basis of the *Jencks* case, interpreted *Jencks* to apply only where the Government "had at the same time in its files a statement" pertinent to a witness' testimony. 103 Cong. Rec. 10120. See also S. Rep. No. 981, 85th Cong., 1st Sess., p. 5; H. R. Rep. No. 700, 85th Cong., 1st Sess., p. 5.[1]

Here government counsel told the court that he did not possess and did not know the whereabouts of the documents which Staula had described. The Court today holds that it fell upon the district judge to conduct a further investigation as to the disposition of the documents, whereby it becomes his duty to call and question

[1] The Court's opinion implies that the defendant is entitled to statements which the Government does not now possess (p. 12). The Act plainly speaks only to a "statement . . . of the witness in the possession of the United States."

the FBI agent who signed the subsequent summary. Defendant did not question the truth or accuracy of the responses of the United States Attorney as to the non-existence of the original notes. Defendant was represented by two competent lawyers who were alert to protect their client's interest through all available trial procedures and tactics. It surely is not the duty of a district judge to investigate a response by one who is an officer of the court as well as of the United States on the assumption that he has intentionally or irresponsibly violated his responsibility to the court and the Government in conducting the Government's case in a manner consistent with basic legal ethics and professional care.

How does the court's duty regarding a claim by defense under the Jencks statute differ from any other claim for the production of a document? We are told that because Agent Toomey was readily available, it devolved on the judge instead of on the defendants to seek whatever light could be thrown on the matter. Is it now the duty of the district judge to do all that a competent defense counsel would do, or would choose, as a matter of trial judgment, not to do? The procedure now suggested places the judge in the position of a voluntary defender for defendants already adequately represented. This seems only the more questionable since it may well be that counsel here were satisfied that the documents had been disposed of in a bona fide manner. It is not the duty of this Court to invent hypothetical situations in which independent action by the district judge might have revealed unexpected facts. There was no suggestion, not a hint—neither before the trial court, nor below, nor upon argument here—that the Government's representation of the non-existence of the documents was not bona fide, was a piece of chicane and as such a fraud upon the court bringing into action the court's protection of its dignity and honor, or a manifestation of professional inadequacy as to call for the court's safeguarding action.

II.

The other issue presented by the case is the producibility of the FBI agent's report which had been put into possession of the court. Subsection (e) of the Jencks Act thus defines the papers in the Government's possession that are subject to production:

> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The plain differentiation between the two clauses is that the former relates to statements written by a witness, while the latter encompasses his oral statements recorded and transcribed by another. As to the statements that the witness had himself set down on paper, Congress desired that his signature or some other form of approval be shown to assure authenticity. The required approval would also quiet any doubts that the witness did not have an adequate opportunity to scrutinize for verification the document which he had prepared. These are appropriate safeguards for the use of these documents as a basis for impeaching the witness' testimony on the stand. As to oral statements, the statute prescribes that their content be "a substantially verbatim recital" of the witness' words, recorded contemporaneously. "Clearly this provision allows the production of mechanical or stenographic recordings of oral statements, even though later transcribed." *Palermo* v. *United States*, 360 U. S. 343, 351–352. Producibility, for purpose of impeachment, of a statement drawn up in the third person by an agent,

requires that the whole oral statement be contemporaneously recorded. Under this standard, a summarization by an agent of selective portions of testimony by the witness would not fall within the scope of the Act. "[B]eyond mechanical or stenographic statements . . . a very restrictive standard is to be applied" in defining what is a "statement" under the statutory language. *Palermo* v. *United States, supra,* at 360. Under subsection (2), it makes no difference whether these agent summaries are signed or approved by the witness; "the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital." *Palermo* v. *United States, supra,* at 352. As the bill originally came out of the House Judiciary Committee, 103 Cong. Rec. 16125, such summaries when approved by the witness would have been subject to production. H. R. Rep. No. 700, 85th Cong., 1st Sess., p. 6. However, the subsequent revision of the bill as finally enacted makes clear that those statements of a witness given orally to the Government must meet the standard of "substantially verbatim" in order to be produced for purposes of impeachment.[2] See Appendix B, *Palermo* v. *United States, supra,* at 358–360.

In *Palermo*, we approved of the district judge holding proceedings *in camera* to determine whether questionable documents constituted statutory "statements." 360 U. S., at 354. It needed no explicitness to establish that the "substantially verbatim" test was to be made by extrinsic proof, not by asking the witness himself whether the docu-

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[2] Insofar as the Court's opinion suggests that, had Staula signed the Interview Report, it would conclusively have been producible, we disagree. Under the statutory language, it still would have been necessary to find that the report was "a substantially verbatim recital" of that which Staula told the agents. Section (e)(1) is inapplicable.

ment in question substantially conformed to what he had told the federal agents. We agree with the Court that the procedure in which the trial judge indulged was erroneous. The witness might deny the accuracy of the document in order to avoid impeachment; even if produced, the document loses much of its potentiality for impeachment if the witness has already examined its contents.

But the trial judge's error in submitting, out of hearing of the jury, the Interview Report for Staula's determination of its accuracy would not warrant reversal if that report proves itself, on its face, not to be a statutory "statement." In *Palermo*, the document was a 600-word summary of a 3½ hour conference, which we held was clearly not a virtually verbatim transcript. 360 U. S., at 355, n. 12. The Interview Report here comes to slightly over 500 words. But the record is silent as to the duration of the interview. Nor does it disclose whether the interview was contemporaneously recorded,[3] or how any such recording was transcribed. However doubtful it may seem, it may be the fact that the interview was very brief, not more than a few minutes, and that the conversation as an entirety was faithfully recorded and constituted an accurate account of all that transpired.

It is the responsibility of counsel for defendant, as has been elucidated, to pursue ascertainment of the correctness of the Government's claim that documents which are

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[3] Aside from Staula's conflicting testimony that the agent took notes.

During the proceedings in chambers, the Government repeatedly asserted that the report was not in existence at the time Staula was interviewed. Assuming this to be true, it is irrelevant; the question is whether there was a contemporaneous recording from which the transcription was later made. See *Palermo* v. *United States*, *supra*, at 351–352.

demandable for production under the Jencks Act are no longer in existence, and for no reprehensible reason chargeable to the Government. That is an issue like any other issue of appropriate evidentiary demand. It is not for the court to question that the foundation for production—here, the non-existence of a document and therefore its non-producibility—is wanting, if counsel for defendant does not question this prerequisite. A very different issue is presented in determining the legal significance of a document like the FBI report under the Jencks Act, which is produced for the confidential inspection of the court and not shown to the defense. Here the responsibility for resolving the issue rests with the court, and it is the court that must pursue appropriate means for ascertaining the facts relevant to judgment.

The district judge should and easily could have probed these matters, vital to ascertainment of the Jencks Act quality of the report, by interrogating counsel, or, as the Court suggests, examining Agent Toomey on the circumstances of the interview.[4] Since on this record we cannot say that the report was patently not producible under the Act, we have no recourse but to remand the matter to the District Court for determination whether the report meets the requirements of subsection (e) (2).

[4] Calling Agent Toomey for this purpose is a very different thing from requiring the judge to call him in order to controvert the Government's assertion that no other notes or documents were in their possession. That was for the defense to deal with.